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NO. 738

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court
For the Western District of Missouri
Central Division.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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PRELIMINARY STATEMENT.

The opinion and decision of the lower court which is the subject matter of this Appeal is now reported as Preisler v. Secretary of State, 257 F. Supp. 953.

Appellants' Jurisdictional Statement set forth a Statement of the Case as required by Rule 15 of this Court. This statement constituted a good faith effort by appellants to present a concise recitation of the facts material to a consideration of the questions presented by the appeal.

The Motion to Affirm filed by appellees adopts appellants' Statement of the Case with purported additions and corrections. An examination of these additions and corrections reflects that appellees have drawn conclusions which they contend are based upon the facts. New facts are recited in the Statement of the Case by appellees. Therefore, appellees' Statement of the Case should be considered by the court as argument rather than as additions and corrections to the facts.

ARGUMENT.

Appellants' Jurisdictional Statement sets forth five questions presented by this appeal. These questions are discussed by appellants under three separate categories for the purpose of demonstrating to the court that the questions are substantial and support the exercise of jurisdiction by this court. Appellees' Motion to Affirm on the ground that the questions presented by the appeal are so unsubstantial as to not need further argument chooses to completely ignore several of the questions presented.

It shall be appellants' intention in this argument to avoid repetition of the discussion in support of jurisdiction on file in appellants' Jurisdictional Statement.

1.

The first question presented by appellants contends that the opinion of the lower court is in conflict with **Wesberry v. Sanders**, 376 U.S. 1, as supplemented and complemented by **Reynolds v. Sims**, 377 U.S. 533. This question is stated on pages 2 and 3 and discussed on pages 7, 8 and 9 of the Jurisdictional Statement. Appellants contend that the court was in error in rejecting the principles stated in Reynolds v. Sims as wholly inapplicable to the validity of congressional districts.

As a result of its total rejection of **Reynolds v. Sims** as inapplicable to the congressional districts under consideration in this case, the lower court found that population is the **sole factor** for legislative consideration in establishing congressional districts and that districts in excess of **de minimis** population deviations are invalid under Article I, Section 2 of the United States Constitution. Appellees are content to rely upon the opinion of the lower court without any discussion of this question. Appellees at no time advance argument that the question is unsubstantial.

Appellants reiterate the position advanced in their Jurisdictional Statement that the overwhelming public interest requires a resolution of this question.

2.

The second question presented by appellants contends that the opinion and decision of the lower court is in conflict with numerous prior decisions of United States District Courts in other jurisdictions. The question is stated on page 2 and discussed on pages 9, 10, 11 and 12 of the Jurisdictional Statement.

Appellees have chosen to completely ignore a discussion of this question. No remote reference to the question can be found either expressly or impliedly in the Motion to Affirm.

The substantiality of this question is closely related to the first question. Other United States District Courts have consistently applied the principles of **Reynolds v. Sims** in congressional reapportionment cases in recognition that these principles supplement and complement **Wesberry v. Sanders.**

The question of the conflict expressly declared by the lower court with the decisions of other United States District Courts is substantial because it is clear that if the lower court had been in harmony with the decisions of other courts its judgment would have been inescapable that congressional districts in the State of Missouri were constitutionally valid. Congressional districts in Indiana were declared valid in **Grills v. Branigin,** 255 F. Supp. 155, and appellants have pointed out in their Jurisdictional Statement, page 10 and 11, that the population variations in the Indiana districts, together with the relative significance of such variations stated in mathematical terms is almost identical to the factual situation existing in Missouri congressional districts. We have been informed that the Indiana

case is pending on appeal by the plaintiffs to this court, **Duddleston, et al. v. Branigin, et al.**, Case No. 370, October Term, 1966. An examination of **Bush v. Martin**, 251 F. Supp. 484, and **Kirby v. Illinois State Electoral Board**, 271 F. Supp. 909, reflects that congressional districts have been found to be valid in the states of Texas and Illinois in which the factual situation is almost identical with the factual situation in Missouri. It is significant that the United States District Court for the Northern District of Illinois participated in establishing the congressional districts referred to in that state.

Appellants have not inferred a conflict by the lower court with the decisions of other United States District Courts. The lower court's opinion is set forth in its entirety in the Jurisdictional Statement, and the court's express conflict and disagreement with **Bush v. Martin**, supra, **Grills v. Branigin**, supra, and **Moore v. Moore**, S.D. Ala. (1965), 246 F. Supp. 578, is stated on page 59. The court's disagreement with **Kirby v. Illinois State Electoral Board**, supra, and **Levitt v. Maynard**, 105 N.H. 447, 202 A.2d 478 (1964), is recited in footnote 19 on page 72.

Therefore, the conflict by the lower court with numerous other United States District Courts presents a question which is substantial because it affects the validity of the Congressional Redistricting Act in Missouri which is under consideration and it also creates uncertainty throughout the United States in regard to the constitutional validity of congressional districts. Appellees' complete silence concerning this question implies acquiescence on their part that the question is substantial.

3.

The third question presented by appellants contends that the opinion and decision of the lower court misconstrued the opinions and decisions of other United States District

Courts in concluding that population is the sole factor for legislative consideration in establishing congressional districts. The question is set forth on page 3 and discussed on page 11 of the Jurisdictional Statement. This question is closely related to the first question.

The lower court has held that population is the **sole factor** for legislative consideration in establishing congressional districts and that the only constitutionally permissible population deviations in congressional districts are **de minimis** population variations. In reaching this conclusion the Court had declared that it is supported by **Calkins v. Hare**, 228 F. Supp. 824, **Drum v. Seawell**, 250 F. Supp. 922, and **Maryland Citizens' Committee v. Tawes**, 253 F. Supp. 731. Appellants contend that the court misconstrued the cited case, the Jurisdictional Statement has discussed the substantiality of this question, and it stands uncontradicted by appellees.

4.

The fourth question presented by appellants contends that erroneous conclusions are made by the lower court in regard to the overvaluation and overweight of votes in the rural areas and that in other respects there are inaccuracies in certain facts stated, together with odious and invidious comparisons of dissimilar fact situations. The question is stated on pages 3 and 4 and discussed on pages 12, 13 and 14 of the Jurisdictional Statement.

Appellees dispose of the question concerning these erroneous conclusions, factual inaccuracies and baseless comparisons by stating that the geographic location of districts is of no legal significance and hence does not present a substantial question; that the factual mistakes of the District Court are of little import, and that factual discrepancies are of no significance in the comparisons made.